IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

WRIT PETITION LD.NO.3310 OF 2004
WITH
WRIT PETITION LD.NO.3296 OF 2004

W.P. LD. NO.3310/2004:

Master Ramkumar Santoshi & Anr. ...Petitioners.
Vs.
Municipal Corporation for Gr. Mumbai,& Ors. ...Respondents.
....
Mr. O. P. Soni i/b. M/s. Ram & Co. for the Petitioners.
Ms.A. K. Savla for Respondent Nos.1 to 4.
.....

W.P. LD. NO.3296/2004:

Vipul Tanna & Ors. ...Petitioners.
Vs.
Municipal Corporation for Gr. Mumbai,& Ors. ...Respondents.
....
Mr. U.J. Makhija i/b. Ms. Preeti Shah for the Petitioners.
Ms.A. K. Savla for Respondent Nos.1 and 2.
Mr.Raju Morey i/b. M/s. Kumanna & Co. for Respondent Nos.3 and 4.
.....

CORAM : DALVEER BHANDARI, C.J. &
DR.D.Y.CHANDRACHUD, J.

December 14, 2004.

P.C.:

Both these petitions involve similar facts and common questions. With the consent of all the Learned Counsel, the petitions have been heard together and are being disposed of by

this judgment.

2. The challenge in these proceedings is to an order passed by the Municipal Commissioner of the Mumbai Municipal Corporation on 4th November 2004. The Petitioners who are occupants of row houses of Buildings 'A' and 'B', have encroached upon common open spaces abutting their row houses by constructing Otlas and a wall around the open space. As a result, the common open spaces have been converted into private and exclusive enclosed spaces in violation of the building permission. The Municipal Commissioner has by a reasoned order, directed the removal of these encroachments.

3. In the earlier round of proceedings under Article 226 of the Constitution which took place before this Court, to which the Petitioners were parties (W.P. 1304 of 2004, Sky Anchorage co-operative Housing Society Ltd. Vs. The Municipal Corporation for Greater Mumbai & Ors.), a Division Bench of this Court on 23rd July 2004 considered the following issues:

"1. Is it open to the builder or for that matter for

> the purchaser of the flat in a building, which form part of the development plan to appropriate any part of a place reserved as open space under the Development Control regulation?
>
> 2. Does the power conferred under regulation 64 on the Commissioner include the power to regularise construction on open space or use of an open space by only one person to the exclusion of the other members?"

4. The Division Bench held that the importance of open spaces as a part of urban planning has been emphasised by the Supreme Court in several cases, among them, **Bangalore Medical Trust vs. B.S. Muddappa** (1991) 4 SCC 54 and **M.C. Mehta vs. Union of India,** (2004) 1 SCC 571. In **Down Mangor Residents Valley, Residents' Welfare Association Vs. Mormugao Municipal Council, Goa,** AIR 2002 Bombay 258, a Division Bench of this Court formulated the principles of law thus :

> "(i) Open spaces maintained as part of a development project or pursuant to a building licence, have to be kept open as per the development permission or building licence as a condition for development or construction in terms of the relevant Act, Rules and Bye-laws or other executive directions;
>
> (ii) These open spaces as referred to in conclusion (i) cannot be altered, converted or changed without hearing the beneficiaries or the parties for whose benefit they were maintained and that too only if there is

> specific provision under any enactment having the force of law, including Bye-laws;
>
> (iii) Those who have put up constructions or changed user or such open spaces as referred to in conclusion (i), can have no equitable consideration in their favour on the ground that the constructions are existing for a long time, whether the constructions are legal or illegal, as the open spaces have been kept for the benefit of the beneficiaries at the time the development permission or building licence was granted, in furtherance of their right to life. This consideration outweighs all other considerations."

5. Following the principles of law laid down by the Supreme Court and by this Court, the Division Bench in its judgment dated 23rd July 2004 came to the conclusion that the conduct of the Petitioners herein in putting up constructions in open spaces and the inaction of the Municipal Corporation was contrary to the Development Control Regulations. On behalf of the Petitioners herein, it was sought to be submitted that the Municipal Commissioner was justified in regularising these encroachments. Rejecting the submission, the Division Bench held as follows :

> "The power under Regulation 64(b) at any rate cannot be exercised in case of development plan, which was sanctioned and building constructed in terms of the

> development plan. If an argument can be countenanced that development plan can also be given a go-bye that would tantamount saying that there is no requirement for any permission for development as it is open to the Commissioner to exercise provisions under Regulation 64(b) at his whims and fancies. In our opinion, this could never be so. ... The power under Regulation 64 in the instant case of regularising construction in open space contrary to Regulation 29(10) could never be resorted or exercised by Respondent No.2 and by the other Respondents. The action, therefore, is totally arbitrary and without jurisdiction and consequently, is liable to be set aside.
>
> In the case of M.C. Mehta Vs. Union of India (2004) 17 ILD 610 (SC) in the matter of regularisation, the Apex Court noted that regularisation cannot be done if it results in violation of right of life enshrined in Article 21 of the Constitution. In the instant case, the right to open space is a part of the requirement of the right to life. Once that be the case and open spaces form a part of right to life, Respondent No.2 could not have regularised the said open space. It is not necessary to advert to other judgments. Suffice it to say, that Respondent No.2 or the other Respondents in exercising statutory functions, could not have regularised the said construction."

Rule was accordingly made absolute in the Writ Petition and the Municipal Corporation was directed to pass appropriate orders according to law after giving to the Petitioners herein, who were Respondents before the Court in the earlier proceedings, an opportunity of being heard. The Municipal Commissioner has accordingly heard submissions on behalf of the contesting parties

and has passed the impugned order holding that the encroachments which have been made by the Petitioners could not be tolerated and had to be removed.

6. All the submissions which have been urged on behalf of the Petitioners have been considered by the Division Bench in the earlier round of proceedings which culminated in the order dated 23rd July 2004. What has been found in the present case is that the Petitioners have encroached upon common open spaces and have appropriated to their exclusive use areas that were intended to serve as a common amenity for all residents. This obviously cannot be tolerated. Indeed, by seeking to sustain the existence of the encroachment with reference to the power of regularization vested in the Municipal Commissioner in Regulation 64, there is a tacit admission of the illegality of what has been done. The impugned order passed by the Municipal Commissioner is in conformity with the law laid down by the Supreme Court which was followed by the Division Bench which delivered judgment on 23rd July 2004 in the proceedings to which the Petitioners as well as the Municipal Corporation were parties. We hence do not find any merit in the petitions.

7. The petitions are accordingly rejected.

CHIEF JUSTICE

DR.D.Y.CHANDRACHUD, J.